Huron Valley-Sinai Hospital *and* Michigan Nurses Association. Cases 07–CA–201332, 07–CA–205971, 07–CA–213556, and 07–CA–217647

April 28, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 29, 2019, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions[2] only to the extent consistent with this Decision and Order.

We adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its prior practice of allowing unit employees to cover for each other during meal breaks,[3] by unilaterally ceasing to consider unit employees' requests to combine 30-minute meal breaks with 15-minute rest breaks on a case-by-case basis,[4] and by failing and refusing to furnish the Union with requested information pertaining to the Respondent's exit interview forms.[5] We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by denying unit employees breaks on April 14 and 15, 2018.[6] Contrary to the judge, however, we find that the Respondent did not unilaterally promulgate a new employee break policy in violation of Section 8(a)(5) and (1).

The record shows that the Respondent has had an employee break policy in effect since 2014. On January 2, 2018, the Respondent's parent company, Detroit Medical Center, published a break policy on its intranet. The parent company's policy included a provision not found in the Respondent's policy, which reads: "If an employee

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and positions of the parties.

[2] We shall amend the judge's conclusions of law to conform to our findings herein and to clarify that the Respondent violated Sec. 8(a)(5) and (1) by failing to furnish the Union with requested completed exit interview forms, not by failing to offer a reasonable accommodation regarding the requested forms as the judge concluded.

[3] Under the unilaterally changed policy, the Respondent permitted only nonunit employees (clinical coordinators) to cover for unit employees during their meal breaks. We amend the judge's remedy for this violation to provide that affected unit employees shall be made whole in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, above at 683; see *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003). We further amend the judge's remedy to require the Respondent to compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014); *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

[4] Contrary to the judge's decision, however, we find that the Respondent's cessation of considering these requests constituted a unilateral change in its practice, not stricter enforcement of its written break policy. See, e.g., *Southside Hospital*, 344 NLRB 634, 634, 640 (2005) (employer violated Sec. 8(a)(5) by unilaterally changing 1-hour break period to one 30-minute break and two 15-minute breaks).

[5] In adopting the judge's finding that the refusal to furnish the requested forms was unlawful, we find that the Respondent failed to establish a legitimate and substantial confidentiality interest in the responses on the exit interview forms. "[T]he party making a claim of confidentiality has the burden of proving that such interests are in fact present," *Jacksonville Area Assn.*, 316 NLRB 338, 340 (1995), and the Respondent neither introduced evidence about the nature of the answers on the completed forms nor demonstrated that the forms actually contained answers to the most sensitive questions (questions 15 through 19). Even so, the record does not foreclose the possibility that some completed forms may contain confidential information. Accordingly, we will order the Respondent to furnish the requested forms, but in compliance, the Respondent will be permitted to make a particularized showing that one or more completed exit interview forms contains information as to which the Respondent has a legitimate and substantial confidentiality interest that must be balanced against the Union's need for the information. See id. at 341 fn. 14.

Having adopted the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to furnish the Union with requested completed exit interview forms, we find it unnecessary to pass on his additional finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to furnish the Union with a blank copy of the form, as the additional finding would not materially affect the remedy.

[6] In adopting this finding, we infer from the timing of these events (i.e., during collective bargaining) and from the language of the parties' interim access agreement (allowing union representatives to access the Respondent's facility "to effectively represent bargaining unit Registered Nurses") that Union Representative Liz Riley was engaged in union activity while in the breakroom at the Respondent's facility on April 14 and 15. Accordingly, as the credited testimony shows that clinical coordinator Steve Smades admitted he denied employees their breaks on those dates because he observed Riley in the breakroom, the record supports a finding that the Respondent retaliated against unit employees because of Riley's union activity. See *PJAX*, 307 NLRB 1201, 1203–1205 (1992) (finding that employer violated Sec. 8(a)(3) where its motive for discriminating against an employee was the union activity it believed another person had engaged in), enfd. 993 F.2d 878 (3d Cir. 1993).

consistently misses meals without the authorization of department management, disciplinary action may occur up to and including termination."

On March 30, 2018, Union Representative Vincent Schraub requested from the Respondent a copy of its current break policy. The Respondent's chief human resources officer, Allison DeMarais, responded the same day, emailing Schraub a copy of the parent company's policy. On April 2, DeMarais sent Schraub an email clarifying that she had mistakenly sent him the parent company's policy and that the Respondent's 2014 policy, attached to the email, remained in effect for unit employees. Over the next few days, the Respondent twice advised Schraub by email that the 2014 policy still applied to unit employees.[7]

In finding that the Respondent unlawfully promulgated a new break policy, the judge focused on the fact that the Detroit Medical Center's 2018 policy included language not contained in the Respondent's 2014 policy. The judge, however, made no reference to the uncontradicted testimonial and documentary evidence that, although the Respondent gave a copy of the wrong policy to the Union by mistake, it promptly informed the Union of its mistake and repeatedly clarified that the parent company's policy did not apply to unit employees.

Having considered the record evidence, including uncontradicted evidence the judge did not reference in his decision, we find that the Respondent did not unilaterally change its break policy. Although the parent company's published policy contained language different from the Respondent's 2014 policy, there is no evidence that the Respondent implemented or enforced the parent company's policy against unit employees. Rather, the evidence shows that the Respondent's policy remained applicable to unit employees at all relevant times. DeMarais's inadvertent mistake in sending the wrong policy to the Union in 2018 did nothing to change the Respondent's policy, especially insofar as the mistake was promptly corrected. Accordingly, we find that the Respondent did not change unit employees' terms and conditions of employment by issuing a new break policy, and we dismiss this complaint allegation.[8]

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Huron Valley-Sinai Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Michigan Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act that serves as the exclusive collective-bargaining representative of the following appropriate unit of employees:

> All full-time, regular part-time, and contingent registered nurses (RNs) and case managers employed by the employer at its facility located at 1 William Carls Drive, Commerce Township, Michigan; but excluding all other employees, including nurse educators, senior nurse educators, clinical coordinators, coordinators, clinical coordinators pcs, nurse practitioners, clinical nurse specialists, coordinator trauma program, clinical improvement specialists, clinical resource nurses, trauma program coordinators, nurse navigators, and guards and supervisors as defined in the Act.

3. By failing to give the Union notice and opportunity to bargain before eliminating unit employees' opportunity to cover for one another during meal breaks and instead exclusively using nonunit employees (clinical coordinators) to cover for unit employees during those breaks, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By failing to give the Union notice and opportunity to bargain before ceasing case-by-case consideration of unit employees' requests to combine 30-minute meal breaks with 15-minute rest breaks, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to furnish the Union with relevant requested information pertaining to the Respondent's completed exit interview forms, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By denying unit employees breaks on April 14 and 15, 2018, because their duly chosen bargaining representative was present and engaged in union activities at the Respondent's facility, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[7] In an April 4 email to Schraub, DeMarais stated that "[t]he existing meals and rest period policy was being followed," that "[t]he 2018 policy applies to non-union employees," that with respect to unit employees "we will remain status quo," and that the Union should "[r]est assured there have been no changes to the status quo of following the policy in effect since 2014." In an April 5 email to Schraub, Detroit Medical Center's director of employee and labor relations, Richard Martwick, stated that "the meal and break policy in effect for the RNs is the one that has been in effect since before the MNA [Michigan Nurses Association] was certified as the bargaining representative."

[8] See, e.g., *New Jersey Bell Telephone Co.*, 308 NLRB 277, 280 fn. 13, 304 (1992) (8(a)(5) allegation dismissed where employer's remarks did not promulgate a new rule applicable to unit employees); *Wabash Transformer Corp.*, 215 NLRB 546, 546–547 (1974) (8(a)(5) allegation dismissed where evidence showed that applicable standard predated the union's campaign and certification).

ORDER

The Respondent, Huron Valley-Sinai Hospital, Commerce Charter Township, Michigan, its offers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by eliminating their opportunity to cover meal breaks for other unit employees and exclusively using nonunit employees to cover unit employees' duties during those breaks without first notifying the Michigan Nurses Association (Union) and giving it an opportunity to bargain.

(b) Changing the terms and conditions of employment of its unit employees by ceasing to consider unit employees' requests to combine 30-minute meal breaks with 15-minute rest breaks on a case-by-case basis without first notifying the Union and giving it an opportunity to bargain.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with information that is relevant and necessary to its performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) Denying unit employees' breaks because their union representative engages in union activities at the Respondent's facility.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes in its unit employees' terms and conditions of employment that were unilaterally implemented on April 9, 2018.

(b) Before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time, regular part-time, and contingent registered nurses (RNs) and case managers employed by the employer at its facility located at 1 William Carls Drive, Commerce Township, Michigan; but excluding all other employees, including nurse educators, senior nurse educators, clinical coordinators, coordinators, clinical coordinators pcs, nurse practitioners, clinical nurse specialists, coordinator trauma program, clinical improvement specialists, clinical resource nurses, trauma program coordinators, nurse navigators, and guards and supervisors as defined in the Act.

(c) Make employees whole for any loss of earnings and other benefits suffered as a result of its unlawful conduct in the manner set forth in the judge's decision as amended in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(e) Furnish to the Union in a timely manner the completed exit interview forms requested by the Union on June 6, 2017.

(f) Within 14 days after service by the Region, post at its Commerce Charter Township, Michigan facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2017.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 28, 2020

John F. Ring, Chairman

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change the terms and conditions of your employment by eliminating your opportunity to cover meal breaks for other unit employees and exclusively using nonunit employees to cover your duties during those breaks without first notifying the Michigan Nurses Association (Union) and giving it an opportunity to bargain.

WE WILL NOT change the terms and conditions of your employment by ceasing to consider your requests to combine 30-minute meal breaks with 15-minute rest breaks on a case-by-case basis without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with information that is relevant and necessary to its performance of its functions as your collective-bargaining representative.

WE WILL NOT deny your breaks because your union representative engages in union activities at our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in the terms and conditions of your employment that we implemented unilaterally on April 9, 2018.

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment of the unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full-time, regular part-time, and contingent registered nurses (RNs) and case managers employed by the employer at its facility located at 1 William Carls Drive, Commerce Township, Michigan; but excluding all other employees, including nurse educators, senior nurse educators, clinical coordinators, coordinators, clinical coordinators pcs, nurse practitioners, clinical nurse specialists, coordinator trauma program, clinical improvement specialists, clinical resource nurses, trauma program coordinators, nurse navigators, and guards and supervisors as defined in the Act.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL furnish to the Union in a timely manner the completed exit interview forms it requested on June 6, 2017.

HURON VALLEY-SINAI HOSPITAL

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-201332 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Donna Nixon, Esq., for the General Counsel.
Catherine A Heitchue-Reed, Esq., for the Respondent.
Amy Batchelder, Esq. (Nickelhoff & Widick, PLLC), of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on March 5, 2019. The Michigan Nurses Association filed the charges giving rise to this case between June 22, 2017, and April 18, 2018. The General Counsel issued the most recent complaint on September 27, 2018.

Many of the allegations in the most recent complaint were settled prior to hearing. Still at issue are the following allegations:

Complaint paragraph 11 alleging that on April 14 and 15, 2018, Respondent, by clinical coordinator, Steve Smades violated Section 8(a)(3) and (1) by prohibiting emergency room nurses from combining their lunch and other rest periods, as was the practice prior to April 14–15, 2018.[1]

Complaint paragraph 12 alleging that Respondent is violating Section 8(a)(5) and (1) by refusing to provide the Charging Party Union copies of the exit interview forms completed by nurses who had resigned during the previous 12 months. Respondent has refused to provide these, as requested, on confidentiality grounds.

Complaint paragraph 18 alleging that Respondent violated Section 8(a)(5) and (1) by unilaterally changing its meal and break policy by adding language that employees could be disciplined for consistently missing meals without authorization and that unit employees would be relieved for breaks by nonunit clinical coordinators, rather than by unit employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent. I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates an acute care hospital in Commerce Township, Michigan, where it annually derives gross revenues in excess of $250,000.[2] Respondent annually purchases and receives products, goods and materials valued in excess of $5000 directly from points outside the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Michigan Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Michigan Nurses Association was certified as the exclusive bargaining representative of all full-time, regular part-time and contingent registered nurses (RNs) employed by Respondent at its facility in Commerce Township, Michigan on March 24, 2016. During bargaining the parties agreed to add case managers to the bargaining unit. Amongst the employees specifically excluded from the unit are clinical coordinators. Respondent and the Union began bargaining in May 2016 and executed a collective-bargaining agreement in November 2018. A major issue between Respondent and the Union has been staffing levels, which the Union believes are too low.

Complaint Paragraph 12

On June 6, 2017, the Union requested that Respondent provide it with a list all of unit RNs who resigned from their positions in the previous 12 months, their department and the start and ending date of their employment. Respondent provided the names in a summary discussed below but did not provide the nurses' department or dates of employment.

The Union also requested copies of exit interview records for all RNs who resigned in the prior 12 months. Respondent provided the Union a summary of the requested exit interviews, but not the completed exit interview forms (GC Exh. 4). This summary contained a 1 to 4-word reason for the nurse's leaving Huron Valley, such as "retirement," "personal reasons," "prom/career advancement," and "resigned without notice." Shortly thereafter, during bargaining, the Union advised Respondent that its response was not sufficient.

At a bargaining session on July 18, 2017, the hospital provided the Union a copy of a blank exit interview form but would not let the Union copy or retain the form. It did not restrict the amount of time the Union had to review the questionnaire at the bargaining session. Respondent insisted on a confidentiality agreement for the Union to retain the blank form and to see the completed forms. It contends that it had a confidentiality interest in the following questions on the blank form, which was introduced by Respondent at the hearing in this matter (Exh. R-3):

> Question 15: Are you aware of any unlawful or fraudulent behavior at DMC or Tenet?
>
> Question 16: Are you aware of any behavior that violates the Standards of Conduct?

[1] The issue litigated at hearing was broader than that pled in the complaint. Complaint par. 11 appears to be limited to the statements and conduct of Smades on April 14 and 15. The GC Br. at pp. 10–11 relies on Chief Human Resource Officer Allison Demarais' March 30 email in contending that strict adherence to the meal and rest policy was being imposed in retaliation for nurses' complaints about staffing levels. I find Respondent was not put on notice that the General Counsel considered Demarais' email to be retaliatory. Therefore, I will not consider this argument.

However, I find that the issue of whether Respondent violated Sec. 8(a)(5) and (1) by unilaterally enforcing a policy that had not been enforced previously, was litigated by consent. RN Tina Grossman's uncontradicted testimony, as well as the March 30, and April 4, 2018 emails from Demarais to Union Representative Vincent Schraub, establish that Respondent began enforcing the policy that meal and rest breaks could not be combined in April 2018 without prior notice to the Union and opportunity to bargain over this change. In fact, Demarais confirmed that the policy had not been strictly enforced prior to March 30, 2018, Tr. 85–86, 94–95. It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated, *Pergament United Sales,* 290 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Kankakee County Training Center for the Disabled,* 366 NLRB No. 181 (slip opinion at p. 3) (2018).

[2] Respondent is part of the Detroit Medical Center (DMC), which is owned by Tenet Healthcare Corporation. Tenet purchased the assets of Vanguard Health Systems, which previously owned DMC and Huron Valley Sinai Hospital in 2013.

> Question 17: Have you ever been instructed to do something you felt was unlawful or fraudulent?
>
> Question 18: Have you been instructed to do something you felt was a violation of Tenet Standards of Conduct?
>
> Question 19: Are you leaving Tenet because of any of these concerns?

The Union refused to sign a confidentiality agreement regarding the blank form.

Complaint Paragraphs 11 and 18: Respondent's Meal Break Policy

At the time the Union was certified, Respondent's meal period and rest period policy had been in effect since June 2013 (GC Exh. 7). The policy applies to unit employees except to the extent that it conflicts with an applicable collective bargaining agreement. The provisions relevant to this case are those that state:

> Paragraph 3.
>
> C. Missed meal periods and/rest breaks may not be accumulated for use and/or pay at a later date. If they are not taken during the current shift, they are forfeited.
>
> D. Combining meal period and rest breaks will be permitted only with the approval of the Department Manager or designee.

On January 2, 2018, while the parties were bargaining for an initial contract, Detroit Medical Center, Respondent's parent, promulgated a meal and rest break policy without first notifying the Union or giving it an opportunity to bargain over new provisions. As with the 2013 policy it is applicable to unit employees except to the extent that it conflicts with an applicable collective bargaining agreement. Among the new provisions was the following statement which the Union alleges violates the Act as a unilateral change:

If an employee consistently misses meals without the authorization of department management, disciplinary action may occur up to and including termination.

The new policy also contains the paragraph from the 2013 policy that, "combining meal period and rest breaks will be permitted only with the approval of the Department Manager or designee."

While Respondent had a policy of prohibiting the combining of meal and rest breaks, this policy was not enforced at Huron Valley until April 2018 (GC Exhs. 13 and 14), March 30, 2018 and April 4, 2018 emails from Allison Demarais, Respondent's chief human resources officer, to union representative Vincent Schraub. Respondent held a meeting for the staff nurses in March 2018 in which it announced to these employees that meal breaks would be covered by clinical coordinators and that meal and rest breaks could no longer be combined. A number of nurses signed a petition protesting the change which Union Steward Tina Grossman presented to Angela Castro, Respondent's manager of the Emergency Department on April 2, 2018.

On April 9, 2018, the policy that clinical coordinators will assign and cover nurses' 30-minute meal break became effective (GC Exhs. 12, 15). The testimony of RN Tina Grossman establishes that prior to April 9, 2018, RNs, rather than non-unit clinical coordinators usually covered for other nurses' rest and meal breaks.[3] Grossman herself had been combining her meal and rest breaks for a total break period of 1 hour. Immediately after April 9, the policy prohibiting combining meal and rest breaks was not strictly enforced; however, afterwards Respondent began to strictly enforce the prohibition.

The General Counsel alleges that the enforcement of this policy is the result of Respondent's animus towards union activity. Specifically, Tina Grossman testified that on April 14 or 15, clinical coordinator Steve Smades told her that nurses would only get a 30-minute break because of "your surprise." By this Grossman understood Smades was referring to the presence of union representative Liz Riley in the employee breakroom.[4] Grossman also testified that later Smades apologized to her and admitted that he had retaliated against unit employees in denying them a rest break because he believed Riley had called him an "A-hole." Grossman told Smades the invective came from somebody else. Smades did not testify. Therefore, Grossman's testimony is uncontradicted.

Conflicting Testimony Regarding Respondent's Proposal of a Confidentiality Agreement

Shaun Ayer, an attorney who was Respondent's chief negotiator in bargaining, testified that he offered the Union a confidentiality agreement by which Respondent would provide the completed exit interviews. He proposed the Union agree that names and responses would be redacted, but that Respondent would provide the Union with the contact information for the nurses who completed the forms. Ayer testified that the reason Respondent would not provide the unreacted exit interviews was that it had promised the exiting nurses confidentiality and did not want the questions or answers regarding unethical or illegal conduct to be disseminated. Union Representative Vincent Schraub testified that Respondent never proposed an accommodation regarding the completed forms. He stated Respondent's offer went only to the blank forms.

Nicole Williams, Respondent's human resources director at the time, took notes for the hospital at the July 18, 2017 bargaining session (Exh. R-3). These notes are not a verbatim account of what transpired and they were not shared with the Union. The notes consist of less than 3 pages for a meeting that lasted from 9:28 a.m. to 2 p.m. The rather cryptic notes consist of the following entries regarding the Union's request for the exit interviews:

> [Respondent] exit Int-provided rationale as to why Emp. Does not want to provide Exit Int. info due to confidentiality & compliance questions.
>
> MNA (The Union) wants something more specific, "if they left for another job, or because of a manager, or unsafe staffing."
>
> MNA Request-Exit Int. Blank Form

[3] Grossman's testimony on this issue is uncontradicted by any firsthand evidence on the part of Respondent. Allison Demarais' testimony on this point at Tr. 87–88 is classic hearsay, which I do not credit.

[4] A charge and complaint allegation that Respondent violated the Act by barring Union Representative Riley from its premises was settled by the parties prior to hearing.

MNA? – Redacting Info other than HIPPA

Resumes 10:23

HVSH (Respondent) "Read" Exit Int. Form-Allowed Union to review but took form back and did not allow union to keep blank. Discussion of (*) meaning-goes to compliance for unethical or illegal violations.

MNA-RFI-Want Blank Form
Would like Exit Int's of RNs who have left

HVSH No Federal or State law that requires employer to provide exit interviews. Questions are sensitive in nature-the employer does not want to discourage ee's from complying

HVSH Proposing Confidentiality of Exit w/ Redacted info; however, Emp has provided spreadsheet for reason.

Respondent concedes that the meeting notes do not corroborate its testimony that it offered to provide the Union with contact information for the nurses who completed exit interviews. It also concedes that it initially proposed redacting the nurses' names and would not identify the nurses' work locations.

Analysis

Changes in Meal Break/Meal Break Coverage and threats of discipline for missing meal breaks

An employer's obligation while bargaining with the certified bargaining representative of its employees for an initial contract is to maintain the status quo, *Daily News of Los Angeles,* 315 NLRB 1236 (1994). During negotiations, Respondent's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole, *NLRB v. Katz,* 369 U.S. 736, 743 (1962), *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991), enfd. 15 F. 3d 1087 (9th Cir. 1991).

Respondent's strict enforcement of its rule against combining meal and rest breaks was a clear departure from the status quo and therefore violates Section 8(a)(5) and (1) of the Act, *Flambeau Arnold,* 334 NLRB 165 (2001); *Hyatt Regency Memphis,* 296 NLRB 259, 263 (1989). The testimony of Respondent's own witness, Human Resource Director, Allison Demarais and her emails to union representative Schraub establish that Respondent's rule was not strictly enforced until bargaining was well under way.

Regardless of whether or not Respondent's written rule prohibited or allowed management to use its discretion in combining meal and rest breaks, its actual practice prior to March 2018 was to allow such combinations. A change in practice, even when not a change in stated policy, during collective bargaining negotiations, violates Section 8(a)((5) and (1), *Flambeau Arnold,* 334 NLRB 165, 166 (2001). Thus, Respondent's enforcement of the rule prohibiting meal and break combinations and the policy mandating meal break coverage by non-unit clinical coordinators violated the Act. The latter practice was not consistent prior to March 2018, nor for a while March/April 2018, but then was strictly adhered to while collective-bargaining negotiations were ongoing.

Huron Valley's new (Jan. 2018) policy threatening disciplinary action if nurses miss breaks also violates Section 8(a)(5) and (1). This is a material change of employee working conditions. The fact that no employee may have disciplined pursuant to this unilateral change is irrelevant to whether it violates Section 8(a)(5). *Flambeau Arnold,* supra.

Finally, Respondent violated Section 8(a)(5) and (1) in altering its established practice of having nurses cover for each other during meal breaks while collective-bargaining negotiations were in progress. This was a material change in that it directly affected the nurses' concerns regarding staffing. The new practice eliminated the work opportunities as a float nurse and thus affected employee wages (Tr. 68).

Respondent by Steve Smades Violated Section 8(a)(3) and (1) in Limiting Emergency Room Nurses to a 30-minute Instead of a 1-hour Break on April 14–15, 2018

I credit RN Tina Grossman's uncontradicted testimony that clinical coordinator Steve Smades admitted to her that he limited emergency room nurses to a 30-minute break on April 14-15 due to his anger at union representative Liz Riley.[5] This constitutes retaliation against the nurses because they were unit members represented by the Union. The fact that Grossman did not engage in any protected activity other than being a bargaining unit member, is irrelevant. She was discriminated against due to her status as a unit member and union member.[6]

Respondent Violated Section 8(a)(5) and (1) in Refusing to Provide the Union its Exit Interview Questionnaire and the Completed Exit Interview Forms

A union is entitled to request and receive information that is relevant to its duties as the collective bargaining representative. When the requested information concerns unit employees it is presumptively relevant. In this matter, the exit interviews pertained to nurses who have left the bargaining unit and thus were not presumptively relevant.

Nevertheless, the Union established the relevance of this request. A major issue in negotiations was staffing levels at the hospital. The Union contended that was a reason that many nurses were leaving Huron Valley. Respondent denied this and for this reason the Union requested copies of the completed exit interviews. Moreover, the Union's concern about staffing was one of the reasons Respondent began to strictly enforce its rule

[5] Grossman's testimony in this regard is not hearsay because it is the admission of a party-opponent pursuant to Rule 801(d)(2)(c) and (d) of the Federal Rules of Evidence. Respondent admitted that Smades was a supervisor but did not admit that Smades was its agent, Smades clearly was Respondent's agent under Board precedent, *Community Cash Stores,* 238 NLRB 265 (1978). When Smades spoke to Grossman, she reasonably believed he was speaking on behalf of Respondent.

[6] Respondent is incorrect in asserting that there can be no violation if the employee-victim did not engage in protected activity. Retaliation against one employee for the protected activities of another violates the Act, *Keller Construction, Inc.,* 362 NLRB 1246, 1255 (2015); *Golub Brothers Concessions,* 146 NLRB 120 (1962); PJAX, 307 NLRB 1201, 1203–1205 (1992) enfd. 993 F.3d 378 (3d. Cir 1993).

against combining breaks (GC Exh. 14), (Demarais email to Schraub at 1:06 p.m. on April 4, 2018).

Respondent's Confidentiality Interest

Respondent contends it was privileged to withhold the completed exit interviews because it had promised departing nurses confidentiality.[7] In this regard the form states that "your responses will be confidential and will not become part of your personnel file. The information will assist us in analyzing employee retention and turnover."

Respondent did not provide departing nurses assurance that their responses would in any way be limited in their dissemination to management and supervisors. One of the justifications for Respondent's confidentiality claim at page 11 of its brief is that the reports may involve close coworkers, friends, and the same managers who may later be asked to provide an employment reference. However, Respondent did not tell the departing nurses that their completed exit interview forms would be unavailable to their former managers, the individuals most likely to be asked for an employment reference. Thus, Respondent's confidentiality interest in the completed forms is insubstantial.

Assuming that Respondent has a legitimate confidentiality interest in the completed exit forms, it did not offer a reasonable accommodation to the Union under the circumstances. The burden of formulating a reasonable accommodation is on the employer, the union need not propose a precise alternative to providing the requested information unedited, *Borgess Medical Center,* 342 NLRB 1105, 1106 (2004).[8]

Respondent's offer to provide the Union the contact information of former nurses is not a reasonable accommodation. That the Union might be able to contact the nurses and do its own survey, is not a sufficient response, *Detroit Newspaper Agency,* 317 NLRB 1071, 1072 (1995); *Medstar Washington Hospital Center,* 360 NLRB 846 (2014); *Kroger Co.* 226 NLRB 512, 513 (1976). [The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form.] The barebones summary of reasons that nurses left Respondent's employ (GC Exh. 4), is an obviously inadequate response to the Union's request for the exit interviews.

There is contradictory testimony as to whether Respondent offered any other accommodation to the Union regarding the completed forms. Respondent took very limited notes at the parties' July 18, 2017 bargaining session (R. Exh. 3). Those notes established that the subject of redactions were discussed. I credit Shaun Ayer's testimony that this discussion was about redactions to the completed forms, not just the blank form. However, neither the notes nor Ayer's testimony provides much evidence as to the specifics of Respondent's suggested accommodation.

I find that a reasonable accommodation to the confidentiality concerns raised by Respondent would have redacted only the name and employee ID number from the completed exit form and the names of persons to whom an unflattering reference was made. Apart from this, the Union's interest in the requested information far outweighs any purported confidentiality interest of Respondent. This is particularly true of the answers to questions # 5, "What prompted you to seek alternative employment?" 12, "What did you like most about your job and/or this company?" 13: "What did you like the least about your job and/or this company?" 14: "What does your new job offer that your job with the company does not?" and 19 "Are you leaving Tenet because of any of these [unlawful or fraudulent conduct, behavior contrary to Tenet Standards of Conduct] concerns?"

Thus, I find that Respondent violated the Act in failing to provide to the Union those responses from each exit interview that touched upon the reason for which the nurse was leaving Respondent's employment.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) and (1) during collective bargaining negotiations by commencing to strictly enforce its prohibition against combining breaks when it had not done so previously.

2. Respondent violated Section 8(a)(5) and (1) during collective bargaining negotiations by regularly covering nurses' meals breaks with clinical coordinators instead of bargaining unit nurses when it had only done so sporadically prior to the beginning of collective bargaining negotiations.

3. Respondent violated Section 8(a)(5) and (1) during collective bargaining negotiations by promulgating a rule threatening unit employees with disciplinary action if they missed paid breaks.

4. Respondent violated Section 8(a)(5) and (1) in failing to offer the Union a reasonable accommodation to address its confidentiality concerns with regard to the Union's request for completed exit interview forms.

5. Respondent violated Section 8(a)(3) and (1) by denying unit employees breaks on April 14–15, 2018, in retaliation for the conduct of a union representative.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Huron Valley-Sinai Hospital, its officers, agents, successors, and assigns, shall

[7] The fact that Respondent introduced the blank interview form at trial, without even asking for a protective order, belies its confidentiality claim for the blank form. Thus, its failure to provide the blank interview form to the Union violates Sec. 8(a)(5) and (1). Moreover, Respondent has failed to give any convincing reason why the questions asked of departing nurses, including those asking whether the nurse was aware of any unlawful or fraudulent behavior should be considered confidential.

[8] Respondent did not raise the argument that the exit interviews were privileged under Michigan state law until it filed its posttrial brief, R. Br. at p. 15. This argument was not timely raised; thus, I decline to consider it, *Medstar Washington Hospital Center,* 360 NLRB 846 fn. 1 (2014).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to bargain with Michigan Nurses Association by failing and refusing to promptly furnish exit interviews completed by former nurses from June 6, 2016.

(b) Enforcing its rule prohibiting the combination of meal and other breaks.

(c) Covering meal breaks with clinical coordinators rather than unit nurses.

(d) Denying bargaining unit members breaks in retaliation for the conduct of union representatives.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with copies of all exit interviews forms received since June 6, 2016, with the following information redacted: the name and ID number of the nurse completing the form; the names of any persons regarding whom an unflattering reference was made.

(b) Rescind the rule threatening discipline for employees if they miss breaks.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the change in the policy regarding the coverage of meal breaks.[10]

(d) Within 14 days after service by the Region, post at its Commerce Township, Michigan facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce our prohibition against combining meal and other breaks without negotiating such a prohibition with the Michigan Nurses Association.

WE WILL NOT cover meal breaks with clinical coordinators instead of bargaining unit nurses without negotiating such a practice with the Michigan Nurses Association.

WE WILL NOT apply a rule threatening discipline against unit employees for missing breaks without negotiating such a rule with the Michigan Nurses Association.

WE WILL NOT retaliate against bargaining unit members on account of the conduct of union representatives.

WE WILL NOT refuse to provide the Michigan Nurses Association with relevant information it requests and if the requested information contains confidential information WE WILL propose a reasonable accommodation to the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the change to our Meal and Break Policy which provides that unit employees may be disciplined for missing breaks.

WE WILL provide the Michigan Nurses Association with the information it requested on June 6, 2017 including all exit interviews completed by former nurses since June 6, 2016. The names and ID numbers of the nurse completing the form will be redacted as will the names of any other individual to whom there are unflattering references.

WE WILL make whole with accrued interest any nurse who suffered an economic loss by virtue of the change in policy regarding the coverage of breaks.

HURON VALLEY-SINAI HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-201332 or by using the QR code

[10] Such payments shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.